United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF AND APPENDIX

NO. 76-4220

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner,

v.

BARTON MANUFACTURING CORPORATION,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

APPENDIX

ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.
Washington, D. C. 20570.

I N D E X

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Barton Manufacturing Corp.

Case No.: 29-CA-3912

6.28.74	Charge filed
9.30.74	Complaint and Notice of Hearing, dated
Undated	Respondent's Answer
11. 6.74	Hearing opened
11. 7.74	Hearing closed
1.31.75	Administrative Law Judge's Decision issued
1.31.75	Board's Order transferring proceeding to the National Labor Relations Board, dated
2.12.75	Respondent's request for extension of time to file exceptions, dated
2.19.75	Board's telegram extending time to file exceptions, dated
3.12.75	General Counsel's exceptions to the Administrative Law Judge's Decision, dated
5. 2.75	Board's Decision and Order, dated
5.11.75	Counsel for Respondent letter requesting a re-hearing of the appeal and also requesting that it be allowed to submit any exceptions to the Administrative Law Judge's ruling, dated
9.17.75	Board's letter to parties advising them that it had decided to accept the exceptions allegedly previously filed by Respondent provided that sufficient and proper copies of such exceptions were received in Washington, D. C., on or before September 25, 1975, with proof of service upon the parties, dated
10.14.75	Board's Order affirming Decision and Order, dated

JD-53-75
Freeport, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

BARTON MANUFACTURING CORP. 1/

and

Case No. 29-CA-3912

PRODUCTION MAINTENANCE AND SERVICE EMPLOYEES UNION, LOCAL 3

Harold Weinrich, Esq., of Brooklyn, N.Y., for the General Counsel.
Howard S. Dorris, Esq. (Parmet, Epstein & Dorris), of Jericho, N.Y., for the Charging Party.
Jon Emanuel, Esq. (Emanuel & Emanuel), of New York, N.Y., for the Respondent.

DECISION

Statement of the Case

IVAR H. PETERSON, Administrative Law Judge: This case was tried before me in Brooklyn, New York, on November 6 and 7, 1974, based upon the complaint issued on September 30, by the Acting Regional Director for Region 29 and upon charges filed by Production Maintenance and Service Employees Union, Local 3, herein called the Union, on June 28. Briefly stated, the complaint alleged that on various dates

1/ As corrected at the hearing.

in June the Respondent, by its president, Hal Wolff, and other named and unnamed supervisors, questioned employees concerning their membership and activities in the Union, warned and directed them to refrain from becoming or remaining members of the Union or giving it any assistance, threatened them with discharge or other reprisals if they became or remained members of or assisted the Union, created the impression of keeping under surveillance the meeting places and activities of the Union and, on or about June 25, discharged Earl Thrane, and thereafter refused to reinstate him, because he had joined and assisted the Union and engaged in other concerted activity for the purpose of collective bargaining and other mutual aid and protection. By such conduct, the complaint alleged that the Respondent had engaged in unfair labor practices violative of Section 8(a)(3) and (1) and 2(6) and (7) of the Act. In its answer, undated, the Respondent denied that it had engaged in any unfair labor practices.

Upon the entire record in the case 2/ and upon my observation of the witnesses as they testified, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a New York corporation, has at all material times maintained its principal office and place of business in Freeport, New York, where it is engaged in the manufacture, sale and distribution of corrugated paper product boxes and related products. The Respondent admits and I find that during the preceding year it purchased and caused to be transported and delivered to the Freeport plant materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to the Freeport plant in interstate commerce and from points outside the State of New York, and that, during the same period, it manufactured, sold and distributed at the Freeport plant products valued in excess of $300,000, of which products valued in excess of $50,000 were furnished to a number of concerns, including Maiden Form, Inc., which enterprises annually produced goods valued in excess of $50,000 which were shipped directly out of the state in which the enterprise was located. I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and I further find that the Union is a labor organization within the meaning

2/ I afforded the parties until December 10 to file briefs with me; however, no briefs were filed.

of Section 2(5) of the Act. In addition, I find that Hal Wolff, Leonard Walters, and Ronnie Zunk, were, respectively, president and officers of the Respondent and, accordingly, its agents. I further find that Henry Greene at all material times held the position of plant foreman and was a supervisor of the Respondent.

II. The Alleged Unfair Labor Practices

A. Preliminary Statement

It is the position of counsel for the General Counsel that the present case arose out of an organizational campaign which the Union began at the Respondent's premises about June 21, when two representatives of the Union, Patino and Christianson, stationed themselves outside the plant at about closing time and began meeting with employees. One of the workers they met with was Thrane, who signed an authorization card at that time and thereafter spoke to other employees urging them to do the same. According to counsel for the General Counsel, a representative of the Respondent observed Thrane speaking to Patino, with whom the Respondent was familiar in view of the fact that 2 years previously during a prior organizational campaign, representatives of the Respondent had become acquainted with him. On the following Monday, June 24, Thrane, so counsel for the General Counsel contends, reported for work and was assigned a delivery and, upon his return shortly before noon, he again met Patino outside the plant and had a brief conversation with him. Thereafter, Thrane gave a union authorization card to Greene at the plant premises and it is contended that Greene took the card and stated that he would think about the matter. Greene denied this. Shortly thereafter, Thrane was called into Wolff's office and, in the presence of Greene, Wolff proceeded to make certain statements to Thrane which it is claimed violated Section 8(a)(1) of the Act.

The Respondent, on the other hand, asserts that Thrane was terminated for cause and, in addition, denies that any representative of the Respondent engaged in any conduct violative of Section 8(a)(1) of the Act.

B. Discharge of Thrane and Other Conduct

Thrane, a young man hired by President Wolff in March 1974, drove a truck for the Respondent making deliveries in the Metropolitan area and also worked in the plant and loaded and unloaded the truck. He was hired at the rate of $3.25 per hour and his hours of work were from 7 to 4:30 in the afternoon, 5 days a week. He was terminated on

June 25. When working in the plant, he was directed by Foreman Greene. About the end of May he asked Wolff for a raise, from a take home salary of $130 per week to $150 per week. According to Thrane, Wolff told him that he "would have to find out what the gross would come out to, and that he would get back to me." However, according to Thrane, Wolff stated that he "did not deserve a raise, that I was unreliable, and that he shouldn't be giving me a raise." Wolff did not "get back" to Thrane and the latter, during the week of June 17, again asked that he be given a raise. Thrane testified that Wolff said he would receive an increase of 25 cents per hour. It is Thrane's testimony that he told Wolff that he would accept that raise on condition that he not be required to work in the plant or load the truck, and only assist in unloading it if his help were necessary. Thrane testified that Wolff agreed to these conditions.

On the afternoon of Friday, June 21, Thrane, shortly after punching out, met two representatives of the Union outside the plant and was given some union literature and an authorization card. Thrane signed the card and advised Patino, one of the Union representatives, "that Barton needed a union bad, and I was going to sign the card right now; which I did." Thrane told Patino that the other employees would be leaving the plant at 4:30 and that he would wait around as he wished to see what happened. As the employees came out, two approached Patino and began talking to him. Patino gave them some literature and authorization cards. While the two employees were talking to the Union representatives, Supervisor Zunk came out, and, according to Thrane, made a gesture at the Union representatives and asked, in substance, if they were "starting in again," and whether the Respondent would "have to go through what we did last year all over again."

Thrane obtained some authorization cards from Patino and stated that during lunch time the following working day he would pass them out to the employees. Upon coming to work on Monday, June 24, Thrane was assigned by Wolff to make a delivery and, as he returned to the plant, Patino and his associates were again in front of the plant. Thrane greeted them and went inside the plant. He testified he met Supervisor Greene on the platform and gave him an authorization card, stating that Greene should "sign the card for his own good." Greene stated, as Thrane related, that he would think it over and then went into President Wolff's office. Shortly thereafter, Thrane was called into the office and, in the presence of Greene and a secretary, Wolff told Thrane that he had heard the latter had signed a union card, to which Thrane responded in the affirmative. Thrane testified that Wolff asked if he knew "if a union come in here, there will have to be Union Shop Rules, which means, if you come in 2 minutes late, I can fire you."

Thrane responded by stating that he had signed a card and that he felt he deserved more money and that "the Union is the only people that can get it for me." Thrane testified that Wolff, characterizing him with an obscene remark, stated that it was persons such as he "that always have to make it hard for me." Wolff, according to Thrane, stated that he had spoken to all the employees that morning and had "told them that if anybody signed that card, that he would fire them," and added that he could call an employment agency and obtain all the help he wanted. Thrane then, as directed by Wolff, went out to lunch but was promptly called back. Wolff then asked him for the authorization cards Thrane had and Thrane gave them to him. Thrane testified that Wolff asked "if it was the Union's idea for me to pass them out," to which Thrane replied that it was his own idea as he wanted "to try to knock some sense into these guys' heads." To this, Wolff replied that Thrane could not "knock any smarts into these guys' heads" and that he had told them that if they did sign the card he would fire them. Thrane then left the office and in front of the plant talked to Patino and told him what had occurred.

Thrane returned from lunch at about 12:45 and continued to work the balance of the afternoon. He reported for work at about 7 a.m. on June 25, and Wolff told him to assist another employee in loading his truck. Thrane then recalled the understanding concerning work assignments that the two had reached and Wolff replied that he did not remember any such agreement. Thrane again mentioned the understanding they had reached, to which Wolff replied, "first you want a union, then you don't want to load the truck up," and stated that he did not like Thrane's attitude. Thrane replied that he would load the truck on that occasion but Wolff replied, "no, don't do it, you're fired, I'm going to find somebody else." Thereupon Thrane gave Wolff the key to the truck and the registration card and punched out. Prior to receiving his raise on June 17, Thrane had assisted in loading the truck almost every day but, after he had received the raise, he was not assigned to load the truck or work in the plant. Thrane testified that before his termination he had not been disciplined or warned about his work; to the contrary, he testified that he had received compliments from Wolff regarding the quality of his work.

Antonio Patino, secretary-treasurer of the Union for the past 10 years, an elected position, testified that the Union has made two attempts to organize the Respondent's employees, the first early in 1972 and the most recent beginning the latter part of June, 1974. During the afternoon of Friday,

June 21, he and an organizer named Clement Christianson, stationed themselves at the Respondent's premises near the loading platform and spoke to a number of employees, including Thrane. Patino gave Thrane some literature and an authorization card and discussed the merits of unionization with him. Thrane signed the authorization card and volunteered to participate in the effort to interest other employees. Patino related that while speaking to Thrane and two other employees, Supervisor Zunk came out of the plant, approached Patino and made a remark to the effect that the Respondent's employees would have to "go through this aggravation" again. Patino previously, during the prior organizational attempt, had had several discussions with Zunk during the course of the 1972 strike the Union had sponsored. 3/ Patino testified that after Zunk had spoken to him Thrane requested a supply of authorization cards which he volunteered to distribute to other employees.

On Monday, June 24, shortly before noon, Patino and his associate Christianson went back to the plant and spoke to a number of employees. Shortly after noon Thrane, who had arrived from a delivery in the meantime and had gone into the plant, came out and told the Union representatives that he had been called into the office by Wolff who had relieved him of the authorization cards given Thrane on Friday. As Patino was leaving the plant, at approximately noon, he observed Wolff, who was on the loading platform between two trailers, looking at him. As previously related, Patino was acquainted with Wolff and testified that in April 1972 when the first organizational attempt was made, Wolff had discharged a number of employees who had signed authorization cards for the Union. On the last attempt, the Union was able to obtain only one authorization card, from Thrane. Patino testified that during the course of his conversation with employees during the noon lunch hour, an employee named Eddie "came out and told us that they did not need a Union there, the plant was too small, and there was nothing that the Union could do for them." Patino asked him whether he was speaking for himself or conveying a message from Wolff. The employee said the sentiments were his own.

Leonard Walter, one of the Respondent's partners, as a witness for the Respondent, testified that he was very much involved in the determination of who should be employed and held frequent discussions with his partners as to the status of employees and who should or should not remain. He related that as a result of his study of employee

---

3/ The strike, which lasted from April 7 to 11, culminated in an attempted consent election agreement which, however, was not consummated because the Respondent questioned the jurisdiction of the Board and suggested that the Union file with the State Labor Relations Board.

timecards, he noticed that Thrane was erratic in his work week and, in his judgment, was "unreliable," a condition that the Respondent could not tolerate. In addition, he testified that Thrane was "accident prone," in that he had had two or three accidents in a relatively short period. Moreover, he stated that of his own knowledge Thrane's truck "had been coming back half laden with merchandise," and that he took "quite a few days" off work without calling the plant to inform the Respondent that he would not be coming to work. Walter testified that when Thrane was hired the "idea was" that if he continued to be employed after 3 months he would be given a raise. However, he related that during this period officials of the Respondent "were not satisfied with him at all, and we had been playing with the idea of letting him go several times." Walter said that, despite the dissatisfaction with Thrane, he was determined to keep him in the employ of the Respondent because Thrane had "promised to quit his other job, his other work, his moonlighting work that he had." By his account, the Respondent was severely handicapped because of the hours Thrane was putting in, and, despite his promises, Thrane did not devote more time to his work for the Respondent. According to Walter, Thrane worked substantially fewer hours during the last 6 weeks of his employment; a fact which, so Walter testified, could be established by the Respondent's records. I suggested to counsel for the Respondent that, since the records were apparently available, I thought that they should be introduced, and they eventually were. 4/

4/ The records concerning Thrane's hours may be summarized as follows:

Period Ending 1974	Hours
3/20	46.75
3/27	45.75
4/3	44
4/10	43
4/17	40.25
4/24	36
5/1	40.75
5/8	36.5
5/15	42.5
5/22	15.75
5/29	0
6/5	35
6/12	25.5
6/19	40.5
6/26	25

The records show that on the first day of the period ending June 5 Thrane went to court, and that he did the same on the second day of the period ending June 28.

With respect to the time Thrane punched in in the morning, the records show that from the period ending April 10 until his discharge he punched in after 7 a.m. on 53 days. They also reveal, however, that he frequently worked beyond the established quitting time.

Concerning the Respondent's claim to the effect that Thrane was "accident-prone," the only documentary evidence placed in evidence with respect to a traffic incident in which Thrane was involved, and which occurred, according to Wolff, on June 19, indicates that the damage to the Respondent's vehicle consisted of the rear tail gate falling off and the right turn signal being bent. In the report, made out by Thrane, he stated that the vehicle he was driving was about to make the right turn when the vehicle behind him struck his vehicle in the rear. From this, it can scarcely be contended that Thrane was at fault or had a record indicating that he was apt to be involved in traffic accidents.

C. Conclusions

After carefully weighing the evidence adduced in this proceeding, I reach the conclusion that the Respondent terminated Thrane because of his activity in support of the Union and, in addition, that it engaged in other activity violative of the Act, as alleged in the complaint. 5/ Accordingly, I shall recommend that the Respondent offer Thrane reinstatement to his former or a substantially equivalent position and pay him for wages lost on account of the discrimination against him, together with interest at the rate of 6 percent per annum, and post the customary notices.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Barton Manufacturing Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminatorily discharging Earl Thrane, the Respondent violated Sections 8(a)(3) and (1) of the Act.

3. By other conduct as set forth above, the Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above, have a close, intimate and substantial relationship to trade, traffic, and commerce

5/ However, I am not persuaded that Wolff engaged in surveillance as I view the evidence in support of that allegation as being not substantial.

among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that by terminating Earl Thrane the Respondent violated Section 8(a)(3) and 8(a)(1) of the Act, and that it engaged in other conduct violative of Section 8(a)(1) of the Act. It will, therefore, be recommended that the Respondent offer Thrane reinstatement to his former job or, if that is no longer available, to a substantially equivalent position, and make him whole for any losses sustained by reason of his termination, with interest at the rate of 6 percent per annum. Additionally, it will be recommended that the Respondent cease and desist from engaging in any other conduct violative of Section 8(a)(1) of the Act, and post appropriate notices to its employees.

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that the National Labor Relations Board, pursuant to Section 10(c) of the Act, issue the following recommended: 6/

ORDER

Respondent, Barton Manufacturing Corp., Freeport, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of employment or other benefits if they engage in union activities, or discriminatorily discharging any employees to discourage membership or activity in support of the Union or any other labor organization.

6/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer to Earl Thrane immediate and full reinstatement to his former job, or if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due and to analyze reinstatement rights under the terms of this recommended Order.

(c) Post at its premises in Freeport, New York, copies of the attached notice marked "Appendix." 7/ Copies of said notice, to be furnished by the Regional Director for Region 29, after being duly signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C.

Ivar H. Peterson
Ivar H. Peterson
Administrative Law Judge

7/ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

FORM NLRB-4727
(9-69)

JD-53-75

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT discourage membership in or activity on behalf of Production Maintenance and Service Employees Union, Local 3, or any other labor organization, by discriminatorily discharging or refusing to reinstate any of our employees or by discriminating in any other manner in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer Earl Thrane immediate and full reinstatement to his former job, or if it no longer exists, to a substantially equivalent position, without prejudice to seniority and other rights and privileges.

WE WILL make the said Earl Thrane whole for any loss of pay suffered as a result of his discharge and our refusal to reinstate him.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named Union or any other labor organization.

BARTON MANUFACTURING CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street -- 4th Floor, Brooklyn, New York, 11241. (Telephone No. 212 - 596-3535).

FORM NLRB-1405
(6-72)

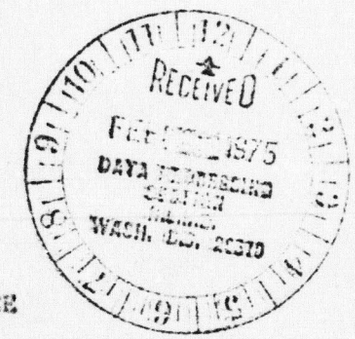
13

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BARTON MANUFACTURING CORP.

and

PRODUCTION MAINTENANCE AND SERVICE EMPLOYEES UNION, LOCAL 3



Case 29-CA-3912

ORDER TRANSFERRING PROCEEDING TO THE
NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.,

IT IS HEREBY ORDERED, pursuant to Section 102.45 of National Labor Relations Board Rules and Regulations, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., January 31, 1975.

By direction of the Board:

John C. Truesdale
Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the page attached hereto.

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board in Washington, D. C., on or before FEB 24 1975

GPO 936-139

NATIONAL LABOR RELATIONS BOARD

Washington, D. C. 20570

NOTICE

It will be appreciated if any party to this proceeding who intends to file exceptions to the Decision of the Administrative Law Judge advises me of such intention as soon as possible. Such notice of intent is not required by the Rules and Regulations. No party, of course, will be prejudiced if plans change after advising me of intent. However, your cooperation in this regard is earnestly requested.

It is an advantage in scheduling the work of the Board for us to know at the earliest possible time whether or not exceptions are likely to be filed in a given case. All we need is a one-sentence letter or telegram giving the case name and number and simply stating that you will or will not file exceptions on behalf of the party you represent.

Such notice should be addressed to the undersigned at 1717 Pennsylvania Avenue, N. W., Washington, D. C. 20570

John C. Truesdale
Executive Secretary

FORM NLRB-1405A
(9-72)

EXCERPTS FROM RULES AND REGULATIONS OF NATIONAL LABOR RELATIONS BOARD SERIES 8, AS AMENDED

Sec. 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.--

(a) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10(c) of the act and sections 102.113 and 102.114 of these rules) file with the Board in Washington, D. C., exceptions to the administrative law judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of said exceptions. Any party may, within the same period, file a brief in support of the administrative law judge's decision. The filing of such exceptions and briefs is subject to the provisions of subsection (j) of this section. Requests for extension of time to file exceptions or briefs shall be in writing and copies thereof shall be served promptly on the other parties. Such requests must be received by the Board 3 days prior to the due date.

(b) Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the administrative law judge's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied on; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued.

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the transcript and the legal or other material relied on.

(d) (1) Within 10 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the provisions of subsection (j) of this section. The provision for 3 additional days as contained in section 102.114 shall be applicable to this subsection.

(2) The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the administrative law judge and it is proposed to support that finding, the answering brief should specify those pages of the record which, in the view of the party filing the brief, support the administrative law judge's finding.

(3) Requests for extension of time to file an answering brief to the exceptions shall be in writing and copies thereof shall be served promptly on the other parties. Such requests must be received by the Board 3 days prior to the due date.

(e) Any party who has no :viously filed exceptions may, within 10 c), or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the administrative law judge's decision, together with a supporting brief, in accordance with the provisions of subsections (b) and (j) of this section. The provision for 3 additional days as contained in section 102.114 shall be applicable to this subsection.

(f)(1) Within 10 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of subsections (c) and (j) of this section. Such answering brief shall be limited to the questions raised in the cross-exceptions. The provision for 3 additional days as contained in section 102.114 shall be applicable to this subsection.

(2) Requests for extension of time to file cross-exceptions, or answering brief to cross-exceptions, shall be in writing and copies thereof shall be served promptly on the other parties. Such requests must be received by the Board 3 days prior to the due date.

(g) No further briefs shall be filed except by special leave of the Board. Requests for such leave shall be in writing and copies thereof shall be served promptly on the other parties.

(h) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

(i) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions or cross-exceptions filed pursuant to the provisions of this section with a statement of service on the other parties. The Board shall notify the parties of the time and place of oral argument, if such permission is granted. . . . .

(j) Exceptions to administrative law judge's decisions, or to the record, briefs in support of exceptions, and briefs in support of administrative law judge's decisions, cross-exceptions, and answering briefs shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Eight copies of such documents shall be filed with the Board in Washington, D. C., and copies shall also be served promptly on the other parties. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

Sec. 102.47 Filing of motion after transfer of case to Board.--All motions filed after the case has been transferred to the Board pursuant to section 102.45 shall be filed with the Board in Washington, D. C., by transmitting eight copies thereof to the Board, together with an affidavit of service upon the parties. Such motions shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

Sec. 102.48 Action of Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.--(a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations of the administrative law judge as contained in his decision shall, pursuant to section 10(c) of the act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purpos-s.

(b) Upon the filing of timely and proper exceptions, and any cross-exceptions, or answering briefs, as provided in section 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or

may reopen the record and receive . .her evidence before a member of the Boar( )other Board agent or agency, or may make other disposition of the case.

(c) Where exception is taken to a factual finding of the administrative law judge, the Board, in det( )mining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief and the answering brief.

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for r( )con-sideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this subsection shall be filed within 20 days, or such further period as the Board may allow, after the service of its decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Any request for an extension of time must be received by the Board 3 days prior to the due date and copies thereof shall be served promptly on the other parties.

(3) The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

Sec. 102.111 Service of process and papers; proof of service.--(a) Charges, complaints and accompanying notices of hearing, final orders, administrative law judge's decisions, and subpenas of the Board, its member, agent, or agency, may be served personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

(b) Whenever these rules require or permit the service of pleadings or other papers upon a party, a copy shall also be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or representative, service upon any one of such persons in addition to the party shall satisfy this requirement.

(c) Process and papers of the Board, other than those specifically named in subsection (a) of this section, may be forwarded by certified mail. The return post office receipt therefor shall be proof of service of the same.

Sec. 102.112 Same; by parties; proof of service.--Service of papers by a party on other parties shall be made by registered mail, or by certified mail, or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. Except for charges, petitions, exceptions, briefs, and other papers for which a time for both filing and response has been otherwise established, service on all parties shall be made in the same manner as that utilized in filing the paper with the Board, or in a more expeditious manner; however, when filing with the Board is accomplished by personal service the other parties shall be promptly notified of such action by telephone, followed by service of a copy by mail or telegraph. When service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. When service is made in any manner provided by the law of a State, proof of service shall be made in accordance with such law.

Failure to comply with the requirements of this section relating to timelines of service on other parties shall be a basis for either (a) a rejection of the document or (b) withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond.

Sec. 102.113 Date of service; filing of proof of service.--(a) The date of service shall be the day when the matter served is deposited in the United States mail or is delivered in person, as the case may be. In computing the time from such date, the provisions of section 102.114 apply.

(b) The person or party serving the papers or process on other parties in conformance with sections 102.111 and 102.112 shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner of service. Proof of service as defined in section 102.112 shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

Sec. 102.114 Time; additional time after service by mail or by telegraph.--(a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. For the purpose of this section a Saturday on which the Board's offices are not open for business shall be considered as a holiday, but a half holiday shall be considered as other days and not as a holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served on him by mail or by telegraph, 3 days shall be added to the prescribed period: Provided however, That 3 days shall not be added if any extension of such time may have been granted.

(b) When the act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted.

GPO 877-317

D--9853
Freeport, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BARTON MANUFACTURING CORP. 1/

and

PRODUCTION MAINTENANCE AND SERVICE EMPLOYEES UNION, LOCAL 3

Case 29--CA--3912

DECISION AND ORDER

On January 31, 1975, Administrative Law Judge Ivar H. Peterson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions 2/ of the Administrative Law Judge and to adopt his recommended Order, as herein modified. 3/

1/ The name of the Respondent appears as amended at the hearing.

2/ In the absence of exceptions by Respondent thereto, we pro forma adopt the Administrative Law Judge's conclusions that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discriminatorily discharging Earl Thrane, and Sec. 8(a)(1) by interrogating, threatening, and warning employees about union activity. Accordingly, we find it unnecessary to pass upon the additional findings of fact requested by the General Counsel.

3/ The General Counsel excepts to the failure of the Administrative Law Judge to include appropriate remedial language in his recommended Order and notice to employees with respect to the unlawful interrogation and the unlawful warning. We find merit in these exceptions. Accordingly, we shall modify the recommended Order and notice, as set forth below.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as herein modified, and hereby orders that the Respondent, Barton Manufacturing Corp., Freeport, New York, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order as modified below:

1. Substitute the following for paragraph 2(a) of the recommended Order:

"(a) Interrogating employees concerning their membership in, activities on behalf of, and sympathy in and for Production Maintenance and Service Employees Union, Local 3, or any other labor organization; warning and directing its employees to refrain from becoming or remaining members of said Union or any other labor organization; threatening employees with loss of employment or other benefits if they engage in union activities; and discriminatorily discharging any employees to discourage membership or activity in support of said Union or any other labor organization."

2. Substitute the attached notice for that recommended by the Administrative Law Judge.

Dated, Washington, D.C. MAY 2 1975

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

John A. Penello, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their membership in, activities on behalf of, and sympathy in and for Production Maintenance and Service Employees Union, Local 3, or any other labor organization.

WE WILL NOT warn or direct our employees to refrain from becoming or remaining members of the Union, or any other labor organization, or to refrain from giving any assistance or support to the Union.

WE WILL NOT threaten our employees with loss of employment or other benefits if they engage in activities on behalf of the Union, or any other labor organization.

WE WILL NOT discourage membership in or activity on behalf of Production Maintenance and Service Employees Union, Local 3, or any other labor organization, by discriminatorily discharging or refusing to reinstate any of our employees or by discriminating in any other manner in regard to hire or tenure of employment or any term or conditions of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act.

WE WILL offer Earl Thrane immediate and full reinstatement to his former job or, if it no longer exists, to a substantially equivalent position, without prejudice to seniority and other rights and privileges.

WE WILL make Earl Thrane whole for any loss of pay suffered as a result of his discharge and our refusal to reinstate him.

All our employees are free to become, remain, or refrain from becoming or remaining members of the above-named Union or any other labor organization.

BARTON MANUFACTURING CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street---Fourth Floor, Brooklyn, New York 11241, Telephone 212--596--3535.

23

EMANUEL & EMANUEL

Counselors at Law

Suite 513
103 Park Avenue
New York, N. Y. 10017
686-5140

Jay Emanuel
Jon Emanuel

May 11, 1975

29-CA-3912

FILE
Exec. Sec. O

Mr. John Trusdale
National Labor Relations Board
Division of Judges
Washington, D.C.

Dear Sir:

Enclosed herewith please find Affidavit of Service by Mail of the exceptions sent to your office over two months ago.

As the envelope never returned to our office, I can only assume that it was lost in the mail, or was misdirected.

As Mr. Weinrich of the NLRB, New York Office, will confirm, a copy of the exceptions were sent to him, and I would respectfully request that I be given an opportunity for a re-hearing of the Appeal, and be allowed to submit any exceptions to the ruling of the Administrative Law Judge.

Would you kindly inform me if this is possible.

Very truly yours,

JON EMANUEL

JE:kb
Enc.

----------X

BARTON MANUFACTURING CORP.,

and

29-CA-3912

PRODUCTION MAINTENANCE AND SERVICE EMPLOYEES UNION, LOCAL 3

----------X

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

GLORIA GONZALES, being duly sworn, deposes and says:

I am not a party to this action, am over the age of 18 and reside at

That on the 13th day of Feb., 1975 I served exceptions upon John Trusdale of the N.L.R.B. by depositing a true copy of same, enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me
this 11th day of
May, 1975.

GLORIA GONZALES

25

FILE
Exec. Sec. O

May 20, 1975

Re: Barton Manufacturing Corp.
Case No. 29-CA-3912

Jon Emanuel, Esq.
Emanuel & Emanuel
Suite 513
103 Park Avenue
New York, New York 10017

Dear Mr. Emanuel:

This is to acknowledge receipt of your letter of May 11, 1975, enclosing your Affidavit of Service of exceptions, requesting rehearing and requesting that you be allowed to submit exceptions to the Administrative Law Judge's decision on behalf of the Respondent in the above proceeding.

Proof of service on the other parties was not enclosed. Please forward an affidavit of service promptly.

Very truly yours,

John C. Truesdale
Executive Secretary

cc: Howard S. Dorris, Esq.
Parnet, Epstein & Dorris
99 Jericho Turnpike
Jericho, New York

NLRB - Region 29
Brooklyn, New York

at

JON EMANUEL, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalties of perjury:

That on the 13th day of February, 1975 I saw my secretary mail a copy of my letter to the Executive Secretary, dated the 13th day of February, 1975, and saw her mail a conformed copy of same to counsel for the General Counsel and Howard Dorris, Esq., counsel for the charging party.

Dated: New York, New York
June 25, 1975

JON EMANUEL

September 17, 1975

Re: Barton Manufacturing Corp.
Case 29-CA-3912

Samuel M. Kaynard, Regional Director
National Labor Relations Board - Region 29
16 Court Street - 4th Floor
Brooklyn, New York 11241

Howard S. Dorris, Esquire
Parmet, Epstein & Dorris
99 Jericho Turnpike
Jericho, New York

Jon Emanuel, Esquire
Emanuel & Emanuel
Suite 513
103 Park Avenue
New York, New York 10017

Gentlemen:

On May 2, 1975, the Board issued its Decision and Order[1/] in the above case, adopting certain conclusions of the Administrative Law Judge "in the absence of exceptions by Respondent thereto."

On May 16, 1975, Respondent's Counsel submitted a letter dated May 11, 1975, alleging that Respondent had in fact submitted exceptions to the Board, attaching a supporting affidvait. No service of these documents upon either Counsel for the General Counsel or Counsel for the Charging Party was shown, and proof of such service was requested on May 20, 1975.

On June 30, 1975, an affidavit dated June 25, 1975, was received from Respondent's Counsel stating, "that on the 13th day of February, 1975 I saw my secretary mail a copy of my letter to the Executive Secretary, dated the 13th day of February, 1975, and saw her mail a conformed copy of same to counsel for the General Counsel and Howard Dorris, Esq., counsel for the charging party." No service of this document upon counsel for the General Counsel or counsel for the charging party was shown.

1/ 217 NLRB No. 123

The Board has been administratively advised that Counsel for the General Counsel did timely receive a carbon copy of Respondent's exceptions to the Decision of the Administrative Law Judge in this matter, but that counsel for the Charging Party did not, and that all parties were served with copies of the above-mentioned letter and affidavits.

The Board, having duly considered the matter, has decided to accept the exceptions allegedly previously filed by Respondent, provided that sufficient and proper copies of such exceptions are received in Washington, D. C., on or before September 25, 1975, with proof of service upon the parties hereto.

If copies of the Respondent's exceptions allegedly previously filed are properly and timely filed with the Board and served upon the parties, the Board will rescind its Decision and Order in this case and consider the matter anew.

Sincerely,

John C. Truesdale
Executive Secretary

JCT/rd

Freeport, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BARTON MANUFACTURING CORP.

and

Case 29-CA-3912

PRODUCTION MAINTENANCE AND SERVICE
EMPLOYEES UNION, LOCAL 3

ORDER AFFIRMING DECISION AND ORDER

On May 2, 1975, the Board issued its Decision and Order 1/ in the above case, adopting certain conclusions of the Administrative Law Judge "in the absence of exceptions by Respondent thereto."

On May 16, 1975, Respondent's counsel submitted a letter dated May 11, 1975, alleging that Respondent had in fact submitted exceptions to the Board, attaching a supporting affidavit. No service of these documents upon either Counsel for the General Counsel or Counsel for the Charging Party was shown, and proof of such service was requested on May 20, 1975.

On June 30, 1975, an affidavit dated June 25, 1975, was received from Respondent's Counsel stating, "that on the 13th day of February, 1975 I saw my secretary mail a copy of my letter to the Executive Secretary, dated the 13th day of February, 1975, and saw her mail a conformed copy of same to counsel for the General Counsel and Howard Dorris, Esq., counsel for the charging party." No service of this document upon counsel for the General Counsel or counsel for the charging party was shown.

Subsequently, the Board was administratively advised that Counsel for the General Counsel did timely receive a carbon copy of Respondent's exceptions to the Decision of the Administrative Law Judge in this matter, but that counsel for the Charging Party did not, and that all parties were served with copies of the above-mentioned letter and affidavits.

The Board having duly considered the matter, decided to accept the exceptions allegedly previously filed by Respondent, provided that sufficient and proper copies of such exceptions were received in Washington, D. C., on or before September 25, 1975, with proof of service upon the parties hereto.

No copies of such exceptions having been received on or before September 25, 1975, the Board hereby affirms its Decision and Order of May 2, 1975, and the matter therefor remains with the Regional Director for the purpose of effecting compliance therewith.

Dated, Washington, D. C., October 14, 1975.

By direction of the Board:

John C. Truesdale

Executive Secretary

1/ 217 NLRB No. 123.